Bank of China v Ngan Ching Wen

HIGH COURT (KUALA LUMPUR) — SUIT NO D22–334 OF 2001
AMELIA TEE ABDULLAH JC
18 NOVEMBER 2010

Banking — Banks and banking business — Overdraft facility — Terms and conditions — Effect of non-compliance with — Whether plaintiff licensed to conduct banking business in Malaysia — Whether defendant bound by conclusive evidence of outstanding amount clause found in general terms and conditions governing banking facilities — Whether plaintiff practiced fraud against defendant

Civil Procedure — Jurisdiction — Forum conveniens — Whether courts of Malaysia had jurisdiction to hear case — Whether existence of foreign jurisdiction clause in general terms and conditions governing banking facilities precluded Malaysian court from exercising its discretion to hear case — Courts of Judicature Act 1964 s 23(1)

The plaintiff had granted the defendant, a qualified lawyer who became a businessman, banking facilities in the form of overdraft facilities. Pursuant to a facility letter dated 8 February 1993 the plaintiff granted the defendant an overdraft facility of USD4.5m ('the first overdraft') and then vide a letter dated 10 March 1993 the defendant was granted an additional facility of USD4.5m ('the second overdraft'), which brought the total of the overdraft facilities granted by the plaintiff to the defendant to USD9m. It was an agreed fact that the overdraft facility of USD9m was operated through the same account ('account No 1'). The defendant had charged his shares in various Malaysian companies in favour of the plaintiff as securities for the banking facilities granted to him. Thereafter, by way of a letter dated 9 November 1994 the defendant had allegedly requested for an additional short term overdraft facility of USD3m, which was to be disbursed through a second account ('account No 2'). There was an additional security of a personal guarantee executed by one Wee Boon Ping ('Wee') for the third overdraft facility. The plaintiff claimed that the defendant did not manage his overdraft facilities well and exceeded his approved authorisation limit many times. The plaintiff had therefore written several letters of demand to the defendant to pay the outstanding sum demanded but the defendant despite his assurances had failed to make payments promptly. The plaintiff had also resorted to selling the shares, which were pledged by the defendant with the plaintiff bank, at market value in order to reduce the plaintiff's indebtedness. The plaintiff then commenced the present action against the defendant for an outstanding sum of

USD5,162,837.31 as at 1 August 2000, with interest and costs due and owing for the overdraft facilities granted by the plaintiff to the defendant. It was the plaintiff's case that the defendant was bound by the conclusive evidence of outstanding amount clause and that since an officer of the plaintiff bank had tendered a certificate of outstandings ('COU'), which stated that the amount outstanding to be USD5,162,837.31 as at 1 August 2000 this was sufficient to prove the amount of indebtedness of the defendant. The defendant disputed the plaintiff's claim and alleged, inter alia, fraud, undue influence and misrepresentation. The defendant also filed a counterclaim against the plaintiff for losses suffered as a result of the plaintiff's failure to dispose of the defendant's shares that were charged with the plaintiff bank at the best available market price. The defendant pleaded that the plaintiff was not licensed to conduct banking business in Malaysia and that all three overdraft facilities extended to him were illegal, void and unenforceable as they offended the provisions of the Exchange Control Act 1953 and Contracts Act 1950. The defendant's case was premised on his contention that the third overdraft facility for USD3m was in fact a facility granted by the plaintiff to Wee but using the defendant's account No 2 as a conduit. In this connection, the defendant made many allegations of illegality, impropriety, fraud and even money laundering against the plaintiff bank. The defendant alleged fraud on the part of the plaintiff in inducing him to open account No 2 and complained that he did not obtain an additional facility of USD3m. The defendant argued that he had never operated account No 2, which was controlled by the plaintiff bank, and that the fact that this account was secured by a personal guarantee from Wee clearly showed that the third overdraft facility was meant solely for Wee's use. The plaintiff contended that the defendant had always admitted in his letters that he regretted owing the plaintiff monies and being unable to make payments promptly and that he had never asked the plaintiff to go after Wee instead of him for the outstanding monies. At the outset of the hearing the defendant raised the preliminary objection as to whether the courts of Malaysia had the jurisdiction to hear the case. The defendant submitted that the existence of a foreign jurisdiction clause in the general terms and conditions governing banking facilities ('the GTC') required the case to be heard in Singapore. The defendant also argued that since the contracts were concluded in Singapore and since the plaintiff was doing banking business in Singapore the case had real and substantial links to Singapore. The plaintiff objected on the grounds of delay and argued that this court had the jurisdiction to hear and try this case as the defendant resided in Malaysia. The plaintiff also submitted that since the defendant had entered unconditional appearance and filed as well as defended several interlocutory applications and appeals in this case he had submitted to the jurisdiction of the court.

Held, allowing the plaintiff's claim with costs and dismissing the defendant's counterclaim:

(1) The court being satisfied that the four subparagraphs of s 23(1) of the

Courts of Judicature Act 1964 are to be read disjunctively found that it had the jurisdiction to hear this case by virtue of the fact that the defendant was residing in Malaysia at the material time. The existence of a foreign jurisdiction clause in the GTC did not preclude a Malaysian court from exercising the discretion as to whether to hear the case or not, in accordance with the doctrine of *forum conveniens*. Further, the fact that the defendant had entered unconditional appearance and filed his defence and a total of eight applications, seven appeals and countless affidavits proved that he had submitted to the jurisdiction of this court. The defendant bore the burden of proving that some other forum was more appropriate to try this case but the reason advanced by the defendant did not justify a long delay. Thus notwithstanding the foreign jurisdiction clause in the GTC the defendant had clearly submitted to the jurisdiction of the Malaysian court. In the circumstances of this case it was found that the Malaysian court did not only have the jurisdiction to hear this case but also the *forums conveniens*, in that, it had the interests of all parties and the ends of justice (see paras 12–13, 16 & 18).

(2) Based on the facts of the instant case the plaintiff could not be construed as having carried on banking business in Malaysia. There was no evidence before the court that the plaintiff had ever collected deposits in Malaysia (see para 74).

(3) The defendant's contention that the plaintiff had no basis in claiming the third overdraft for USD3m because he had not signed on the third facility letter to signify his acceptance was totally without merit. It was found that as stated in the three letters of offer, the banking facilities were granted subject not just to the terms and conditions contained in the said letters but also to the plaintiff's GTC. In accepting the plaintiff's letters of offer, the defendant had also clearly indicated his acceptance of the plaintiff's GTC, which included a conclusive evidence clause. This clause was sufficient to prove the amount of indebtedness of the defendant in the absence of evidence of any manifest error on the certificate. As such, based on the COU, which stated that the amount outstanding as at 1 August 2000 was USD5,162,837.31 and the evidence adduced for the plaintiff the court found that the plaintiff had proved the existence of facts in favour of its case (see paras 79 & 81–84).

(4) Based on the totality of the evidence adduced, the court found it difficult to agree with the defendant's contention that the third overdraft facility for USD3m was in fact a facility granted by the plaintiff to Wee but using the defendant's account No 2 as a conduit. The court found that the defendant's allegations against the plaintiff bank and Wee to be both unbelievable as well as inconsistent with his own evidence and contemporaneous documents. Based on the above, the court found that the defendant had failed to prove his version of events on a balance of

probabilities and that the defendant had failed to show that the additional overdraft of USD3m was a loan from the plaintiff to Wee using the defendant's account. Notwithstanding that Wee had actually utilised all or part of the overdraft of USD3m, the defendant bore the responsibility for that loan (see paras 85, 89, 91 & 93).

(5) Based on the totality of the evidence, the court was unable to find that the plaintiff had practiced deception on the defendant and thus the defendant had failed to establish fraud against him on the part of the plaintiff beyond reasonable doubt (see para 97).

(6) The defendant's allegation that the plaintiff committed money laundering was a bare allegation with not an iota of evidence to support it (see para 98).

[Bahasa Malaysia summary

Plaintif telah memberikan defendan, peguam berkelayakan yang menjadi peniaga, kemudahan perbankan dalam bentuk kemudahan overdraf. Menurut surat kemudahan bertarikh 8 Februari 1993 plaintif telah memberikan defendan kemudahan overdraf sebanyak USD4.5 juta ('overdraf pertama') dan kemudian melalui surat bertarikh 10 Mac 1993 defendan telah diberikan kemudahan tambahan sebanyak USD4.5 juta ('overdraf kedua'), yang membawa kepada jumlah keseluruhan kemudahan overdraf yang diberikan oleh plaintif kepada defendan sebanyak USD9 juta. Adalah fakta yang dipersetujui bahawa kemudahan overdraf USD9 juta telah dimasukkan melalui akaun yang sama ('akaun No 1'). Defendan telah mencagarkan saham-sahamnya dalam pelbagai syarikat di Malaysia bagi pihak plaintif sebagai cagaran untuk kemudahan perbankan yang telah diberikan kepadanya. Selepas itu, melalui surat bertarikh 9 November 1994 defendan dikatakan telah memohon kemudahan overdraf tambahan jangka pendek sejumlah USD3 juta, yang dibayar melalui akaun kedua ('akaun No 2'). Terdapat cagaran tambahan berbentuk jaminan peribadi yang disemurnakan oleh Wee Boon Ping ('Wee') untuk kemudahan overdraf ketiga. Plaintif mendakwa bahawa defendan tidak mengurus kemudahan overdrafnya dengan baik dan telah banyak kali melebihi had kuasa yang dibenarkan. Plaintif dengan itu telah menulis beberapa surat tuntutan kepada defendan agar membayar jumlah terhutang yang dituntut tetapi defendan meskipun telah memberikan jaminan tetap gagal membuat bayaran dengan segera. Plaintif juga mengambil jalan keluar dengan menjual saham-saham, yang dicagarkan oleh defendan dengan plaintif bank, pada nilai pasaran bagi tujuan mengurangkan keberhutangan plaintif. Plaintif kemudian telah memulakan tindakan ini terhadap defendan untuk jumlah terhutang sebanyak USD5,162,837.31 setakat 1 Ogos 2000, dengan faedah dan kos yang perlu dibayar dan terhutang untuk kemudahan overdraf yang diberikan oleh plaintif kepada defendan. Adalah kes plaintif bahawa defendan terikat dengan fasal keterangan konklusif tentang baki jumlah dan memandangkan pegawai plaintif bank telah menenderkan sijil

baki yang perlu dibayar itu ('COU'), yang menyatakan bahawa baki jumlah adalah USD5,162,837.31 setakat 1 Ogos 2000 ini memadai untuk membuktikan jumlah keberhutangan defendan. Defendan telah mempertikaikan tuntutan plaintif dan mendakwa, antara lain, fraud, pengaruh tidak wajar dan salah tanggap. Defendan juga telah memfailkan tuntutan balas terhadap plaintif untuk kerugian yang dialami akibat kegagalan plaintif menjual saham-saham defendan yang dicagarkan dengan plaintif bank pada harga pasaran sedia ada. Defendan telah memplid bahawa plaintif tidak mempunyai lesen untuk menjalankan perniagaan perbankan di Malaysia dan bahawa kesemua tiga kemudahan overdraf yang diberikan kepadanya adalah menyalahi undang-undang, tidak sah dan tidak berkuatkuasa kerana melanggar peruntukan Akta Kawalan Pertukaran Matawang 1953 dan Akta Kontrak 1950. Kes defendan berasaskan hujahnya bahawa kemudahan overdraf ketiga untuk USD3 juta pada hakikatnya kemudahan yang dberikan oleh plaintif kepada Wee tetapi dengan menggunakan akaun No 2 defendan sebagai *konduit*. Berkaitan ini, defendan telah membuat banyak dakwaan tentang kepenyalahan undang-undang, perbuatan yang tidak elok, fraud dan juga pelaburan wang haram terhadap plaintif bank. Defendan mendakwa fraud di pihak plaintif yang mendorongnya membuka akaun No 2 dan mengadu bahawa dia tidak memperoleh kemudahan tambahan sejumlah USD3 juta itu. Defendan berhujah bahawa dia tidak pernah mengendalikan Akaun No 2, yang dikawal oleh plaintif bank, dan hakikat bahawa akaun ini dicagarkan dengan jaminan peribadi daripada Wee jelas menunjukkan bahawa kemudahan overdraf ketiga adalah semata-mata untuk kegunaan Wee. Plaintif menegaskan bahawa defendan sentiasa mengakui dalam surat-suratnya bahawa dia kesal berhutang dengan plaintif dan tidak mampu membuat bayaran segera dan bahawa dia tidak pernah meminta plaintif mencari Wee dan bukan dia untuk wang yang perlu dibayar itu. Pada permulaan perbicaraan defendan telah menimbulkan bantahan awal berhubung sama ada mahkamah di Malaysia mempunyai bidang kuasa untuk mendengar kes tersebut. Defendan berhujah bahawa kewujudan fasal bidang kuasa luar negara dalam terma dan syarat am mengawal kemudahan perbankan ('GTC') menghendaki kes ini didengar di Singapura. Defendan juga berhujah bahawa memandangkan kontrak-kontrak telah dimasuki di Singapura dan memandangkan plaintif menjalankan perniagaan perbankan di Singapura kes ini mempunyai kaitan sebenar dan penting dengan Singapura. Plaintif membantah atas alasan kelewatan dan berhujah bahawa mahkamah ini mempunyai bidang kuasa untuk mendengar dan membicarakan kes ini kerana defendan menetap di Malaysia. Plaintif juga berhujah bahawa memandangkan defendan telah memasuki kehadiran tanpa syarat dan juga memfailkan dan membela beberapa permohonan interlokutori dan rayuan daam kes ini dia telah berserah kepada bidang kuasa mahkamah tersebut.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan:

(1) Mahkamah berpuas hati bahawa empat sub-perenggan s 23(1) Akta Kehakiman Mahkamah 1964 yang patut dibaca secara berasingan mendapati bahawa ia mempunyai bidang kuasa untuk mendengar kes ini menurut fakta bahawa defendan menetap di Malaysia pada masa matan. Kewujudan fasal bidang kuasa negara asing dalam GTC tidak menghalang mahkamah Malaysia daripada menggunakan budi bicara tentang sama ada untuk mendengar kes atau tidak, bersesuaian dengan doktrin *forum conveniens*. Selanjutnya, fakta bahawa defendan telah memasuki kehadiran tanpa syarat dan memfailkan pembelaannya dan sejumlah lapan permohonan, tujuh rayuan dan afidavit yang tak terkira membuktikan bahawa dia telah berserah kepada bidang kuasa mahkamah ini. Defendan mempunyai beban bukti bahawa forum lain adalah lebih sesuai untuk mendengar kes ini tetapi sebab yang dikemukakan oleh defendan tidak menjustifikasikan kelewatan yang berpanjangan. Oleh itu meskipun fasal bidang kuasa negara asing defendan dengan jelas telah berserah kepada bidang kuasa mahkamah Malaysia. Dalam keadaan kes ini adalah didapati mahkamah Malaysia bukan sahaja mempunyai bidang kuasa untuk mendengar kes ini tetapi juga *forum conveniens* di mana, ia memelihara kepentingan semua dan menegak keadilan (lihat perenggan 12–13, 16 & 18).

(2) Berdasarkan fakta kes ini plaintif tidak boleh ditafsirkan sebagai menjalankan perniagaan perbankan di Malaysia. Tiada bukti di hadapan mahkamah bahawa plaintif telah mengutip deposit-deposit di Malaysia (lihat perenggan 74).

(3) Hujah defendan bahawa plaintif tiada asas untuk menuntut overdraf ketiga sejumlah USD3 juta kerana dia tidak menandatangani surat kemudahan ketiga untuk menunjukkan penerimaannya adalah langsung tidak bermerit. Adalah didapati bahawa sepertimana yang dinyatakan dalam tiga surat tawaran, kemudahan perbankan diberikan bukan sahaja tertakluk kepada terma dan syarat yang terkandung dalam surat-surat tersebut tetapi juga kepada GTC plaintif. Dalam menerima surat-surat tawaran plaintif, defendan juga jelas menunjukkan penerimaannya tentang GTC plaintif, yang termasuklah fasal keterangan konklusif. Fasal ini mencukupi untuk membuktikan jumlah keberhutangan defendan dengan ketiadaan keterangan apa-apa kesalahan besar atas sijil. Oleh itu, berdasarkan COU, yang menyatakan bahawa jumlah yang perlu dibayar setakat 1 Ogos 2000 adalah sebanyak USD5,162,837.31, dan keterangan yang dikemukakan bagi pihak plaintif mahkamah mendapati bahawa plaintif telah membuktikan kewujudan fakta-fakta menyebelahi kesnya (lihat perenggan 79 & 81–84).

(4) Berdasarkan keseluruhan keterangan yang dikemukakan, mahkamah mendapati sukar untuk bersetuju dengan hujah defendan bahawa kemudahan overdraf ketiga untuk USD3 juta sememangnya kemudahan yang diberikan oleh plaintif kepada Wee tetapi menggunakan akaun No 2 defendan sebagai konduit. Mahkamah mendapati bahawa dakwaan defendan terhadap plaintif bank dan Wee sama sekali tidak boleh dipercayai dan tidak konsisten dengan keterangannya sendiri dan dokumen-dokumen semasa. Berdasarkan di atas, mahkamah mendapati bahawa defendan telah gagal untuk membuktikan versi kejadiannya atas imbangan kebarangkalian dan bahawa defendan telah gagal menunjukkan bahawa overdraf tambahan USD3 juta itu adalah pinjaman daripada plaintif kepada Wee dengan menggunakan akaun defendan. Meskipun Wee sebenarnya telah menggunakan semua atau sebahagian daripada overdraf USD3 juta itu, defendan mempunyai tanggungjawab untuk pinjaman tersebut (lihat perenggan 85, 89, 91 & 93).

(5) Berdasarkan keseluruhan keterangan, mahkamah masih belum mendapati bahawa plaintif mengamalkan penipuan ke atas defendan dan oleh itu defendan telah gagal untuk membuktikan fraud terhadapnya di pihak plaintif melampaui keraguan munasabah (lihat perenggan 97).

(6) Dakwaan defendan bahawa plaintif telah melakukan penipuan wang haram adalah dakwaan semata-mata tanpa apa-apa keterangan untuk menyokongnya (lihat perenggan 98).]

Notes

For cases on forum conveniens, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4917–4931.

For cases on overdraft facility, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2000–2011.

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160; [1995] 1 CLJ 273, SC (refd)

'Avro International' The 'Avro Venture' 'Avro International' (owners of), The v Arabian Marine Bunkers Sales Co Ltd & Anor [1988] 1 MLJ 147, CA (refd)

Banque Nasionale de Paris v Wuan Swee May & Anor [2000] 3 MLJ 587, HC (folld)

BP (Sabah) Sdn Bhd v Syarikat Jubrin Enterprise & Anor [1996] MLJU 449; [1997] 1 LNS 354, HC (refd)

BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors [2000] 2 MLJ 70; [2000] 2 CLJ 197, CA (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (folld)

EG Tan & Co (Pte) (in liquidation) [1993] 2 CLJ 192, HC (refd)

Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd [2006] 4 MLJ 271; [2006] 2 CLJ 1021, CA (folld)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (folld)
Kenichi Hattori & Anor v Minoru Yamashita & Anor [2003] MLJU 608; [2004] 1 CLJ 491, HC (folld)
Mayor, Aldermen, and citizens of Norwich v Norwich Electric Tramways Company, Limited [1906] 2 KB 119, CA (refd)
Spiliada Maritime Corp v Cansulex Ltd; The Spiliada [1986] 3 All ER 843, HL (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (folld)

Legislation referred to

Banking Ordinance 1958
Contracts Act 1950
Courts of Judicature Act 1964 s 23(1), 23(1)(b)
Exchange Control Act 1953
Rules of the High Court 1980 O 3 r 5, O 14, O 26 rr 1, 3, O 41 r 6, O 56 r 1(4), O 92 r 4

R Vinayaga (Derrick Ong with him) (Skrine) for the plaintiff.
Amir bin Ismail (Ng Thian Tuan and Keith Kwan with him) (Tuan, Mohd Zain & Co) for the defendant.

Amelia Tee Abdullah JC:

[1] The plaintiff is the Bank of China. Its claim against the defendant, Ngan Ching Wen, is for an outstanding sum of USD5,162,837.31 as at 1 August 2000, interest, and costs due and owing for overdraft facilities granted by the plaintiff to the defendant. The plaintiff's claim is disputed by the defendant, Ngan Ching Wen, who has alleged, inter alia, fraud, undue influence and misrepresentation. The defendant has also filed a counterclaim against the plaintiff for losses suffered as a result of the plaintiff's failure to dispose of the Ganda and Samanda shares at the best available market price.

PRELIMINARY OBJECTION ON JURISDICTION

The defendant's objections

[2] At the outset of the hearing, the defendant had raised a preliminary objection as to whether the courts of Malaysia has jurisdiction to hear this case. It was contended by learned counsel for the defendant that vide cl 12 of the general terms and conditions governing banking facilities, the parties had agreed that the facility letter shall be governed by the laws of the Republic of Singapore, that the defendant irrevocably submits to the jurisdiction of the

courts of Singapore and agrees to be bound by the decision of the judicial committee of the Privy Council. Learned counsel had argued that since Malaysia had closed its doors to appeals to the Privy Council, the defendant would thus be deprived of one last level of appeal.

[3] It was also argued on behalf of the defendant that the case has real and substantial links to the Republic of Singapore as the contracts were concluded in Singapore, the plaintiff was doing banking business in Singapore, the facilities were drawn down in Singapore, and the defendant pledged Malaysian shares to the plaintiff's nominees in Singapore. Counsel submitted that the documents and records were held by the plaintiff in Singapore and the calling of witnesses would be easily done in Singapore.

[4] As regards the issue of delay, the defendant argued that it was only two weeks earlier when the plaintiff furnished the court with the witness statement of their only witness that the defendant realised that the person who signed the agreement was not being called to testify. The defence's contention is that that person is a Singaporean and the defendant 'cannot issue a subpoena to a person out of jurisdiction'. As such, the defendant submits that a delay of nine years before raising the issue of jurisdiction is justifiable. The defendant relies on the case of *Mayor, Aldermen, and citizens of Norwich v Norwich Electric Tramways Company, Limited* [1906] 2 KB 119 as authority for the proposition that an objection to jurisdiction may be raised at any time.

The plaintiff's arguments on the preliminary objection

[5] In response, it was argued by the plaintiff that this court has jurisdiction to hear and try this case. It was pointed out that the defendant resides in Malaysia and that s 23(1)(b) of the Courts of Judicature Act 1964 provides the High Court of Malaya with jurisdiction to try all proceedings where the defendant or one of several defendants resides or has his place of business. It is sufficient if the action falls within one of the four limbs of s 23(1). The cases of *Kenichi Hattori & Anor v Minoru Yamashita & Anor* [2003] MLJU 608; [2004] 1 CLJ 491 and *Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd* [2006] 4 MLJ 271; [2006] 2 CLJ 1021 were cited in support of the argument the subparagraphs of s 23(1) are to be construed disjunctively. Since the defendant was residing at No 9 Jalan Teruntong, Damansara Heights, 50490 Kuala Lumpur at the material time and this was also the address where the plaintiff's facility offer letters were sent, it was argued that the court has jurisdiction in this case.

[6] The plaintiff had also pointed out that the defendant had entered unconditional appearance in this case. Learned counsel for the plaintiff submitted a number of authorities on the effect and consequences of entering unconditional appearance. In the case of *EG Tan & Co (Pte) (in liquidation)* [1993] 2 CLJ 192, His Lordship Abdul Malek bin Ahmad J held that by entering unconditional appearance, the defendant had submitted to the jurisdiction of the court. Further, in the case of *The 'Avro International' The 'Avro Venture' 'Avro International' (owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor* [1988] 1 MLJ 147, the Court of Appeal had held as follows:

> The effect of entering an unconditional appearance is two-fold: (1) it waives any irregularity of the writ or its service; and (2) the defendant is considered to have submitted to the jurisdiction of the court: see Vol 1, *The White Book*, (1979 Ed), para 12/1/3. A defendant who wishes to set aside the writ or its service for non-compliance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore file a conditional appearance.

[7] Learned counsel for the plaintiff had also submitted that in this case the defendant had also taken further steps in this matter by filing and defending several interlocutory applications and making appeals to the Court of Appeal against those High Court decisions. The defendant's conduct thus shows that the defendant has submitted to the jurisdiction of the Malaysian courts and that it is unacceptable and implausible for the defendant to raise this preliminary objection now.

[8] Learned counsel also touched on the issue of *forum non conveniens* which he submitted, was never raised by the defendant since the filing of the suit in 2001. Learned counsel referred the court to the case of *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70; [2000] 2 CLJ 197 where the Court of Appeal held as follows:

> Where an action is properly commenced in this country that is to say in a case where the High Court is seized of jurisdiction, there is a rebuttable presumption that the domestic court is the *forum conveniens*. The burden is accordingly on the defendant to satisfy the court that the action within our jurisdiction should be stayed on the ground that there are factors that weigh in favour of the dispute being litigated before the foreign court. It must be established that there is clearly a more appropriate forum in another country with which the action has the most real and substantial connection and that it is in the interests of justice to have the dispute resolved by that forum.

[9] The plaintiff submitted that the action had been properly commenced in this court in 2001 and the defendant has entered unconditional appearance.

Apart from the many interlocutory applications being filed and heard and taken up on appeal, the parties had also taken all necessary steps to have the action tried in this court.

[10] Learned counsel for the plaintiff had also submitted that in view of the preliminary objection being raised at this late stage, it would not be suitable or appropriate for the Singapore courts to hear this matter. Reference was made to the Supreme Court case of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160; [1995] 1 CLJ 273 where Peh Swee Chin FCJ held that notwithstanding the existence of a foreign jurisdiction clause, a Malaysian court could not be precluded simpliciter from exercising the discretion, according to the doctrine of *forum conveniens*, whether to hear the case or not.

The court's ruling on the preliminary objection

[11] The court has carefully considered the preliminary objection raised by the defendant as regards the jurisdiction of this court to hear the case. In coming to a decision, the court has carefully considered the submissions of both parties as well as the authorities relied upon in support of their arguments.

[12] On the authority of *Kenichi Hattori* and *Enersafe* the court is satisfied that the four subparagraphs of s 23(1) of the Courts of Judicature Act 1964 are to be read disjunctively. Since the defendant was residing in Malaysia at the material time, the court finds that by virtue of s 23(1)(b), this court has the jurisdiction to hear this case. Even so, the court still has the discretion to decide whether to deal with it based on the doctrine of *forum conveniens*.

[13] The existence of a foreign jurisdiction clause in the general terms and conditions governing banking facilities cannot be disputed. However, on the authority of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor*, the existence of such clause cannot preclude a Malaysian court from exercising the discretion whether to hear the case or not in accordance with the doctrine of *forum conveniens*.

[14] As stated by Lord Goff in the case of *Spiliada Maritime Corp v Cansulex Ltd; The Spiliada* [1986] 3 All ER 843 which is a leading authority on the subject of *forum conveniens*:

> The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

[15] The court notes that in this case, the defendant had entered unconditional appearance on 12 May 2001. Since that date, the defendant had filed affidavits on 29 August 2001 and 8 January 2002 in response to the plaintiff's O 14 application; applied by summons for leave to serve interrogatories under O 26 rr 1 and 3 on 28 January 2002; *filed his defence and counterclaim/set off on 21 February 2002*; filed a notice of appeal against the decision of the SAR (11 March 2002); applied under O 14 to enter summary judgment against the plaintiff in respect of certain portions of his counterclaim (14 March 2002); filed a certificate of urgency and application under O 41 r 6 and O 92 r 4 to strike off certain letters and exhibits in affidavits filed on behalf of the plaintiff (14 March 2002); filed a *notis rayuan* to a judge in chambers against the SAR's decision in respect of his striking out application (21 May 2002); filed a *notis rayuan* to a judge in chambers against the decision of the SAR re the O 14 application (4 June 2002); filed a *notis rayuan* to a judge in chambers against the decision of the SAR re his application for interrogatories (4 June 2002); filed a *notis rayuan* against the decision of the SAR re security for costs (4 June 2002); filed a *notis rayuan* against the decision of the SAR re dismissal of the defendant's application under O 14 (4 June 2002); filed a summons in chambers under O 56 r 1(4), O 3 r 5 and O 92 r 4 for stay pending hearing of the appeal before a judge in chambers (27 June 2002); filed a summons in chambers for stay of execution pending appeal to the Court of Appeal (30 October 2003); filed a summons in chambers under O 3 r 5 and O 92 r 4 for all proceedings against the defendant to be stayed pending his appeal to the Court of Appeal except his own application for stay (16 January 2004); filed a *notis rayuan* to a judge in chambers re the striking out of his counterclaim (10 November 2004); filed a summons in chambers for leave to amend his defence and counterclaim (9 October 2007); *filed an amended defence and counterclaim/set off on 21 May 2009*; filed a *notis rayuan* to a judge in chambers re the rejection of certain paragraphs of his defence and counterclaim/set off (14 May 2009); *filed another amended defence and counterclaim/set off (22 January 2010)*.

[16] From a recounting of the case history, a total of eight applications, seven appeals and countless affidavits have been filed by the defendant since he first entered appearance on 12 May 2001, some nine years ago. Based on this, the court has no hesitation in finding that the defendant had more than submitted to the jurisdiction of this court. Not only had the defendant entered appearance and filed his defence, he had applied for and amended his defence and counterclaim/set off twice and filed a total of seven notices of appeal. The court finds that notwithstanding the foreign jurisdiction clause in the general terms and conditions governing banking facilities, the defendant has clearly submitted to the jurisdiction of the Malaysian court.

[17] The burden of proving that some other forum is a more appropriate forum to try this case rests on the defendant. Although it was submitted by learned counsel for the defendant that the defendant has been deprived of one final avenue of appeal to the Privy Council, the court is satisfied that this argument is a non-starter as the Republic of Singapore had in fact abolished appeals to the Privy Council in 1994. The court finds that the reason advanced by the defendant for the delay namely that they had just realised that the person who signed the agreement was not being called to testify and they could not issue a subpoena to him is not a good or valid reason and no other reasons had been shown to justify or warrant such a lengthy delay.

[18] In light of the fact that more than nine years has elapsed since the defendant had entered appearance, and the plaintiff would be caught by the statute of limitations and seriously prejudiced if it were forced to institute proceedings in Singapore at this late stage, the court is of the view that not only does the courts of Malaysia have jurisdiction to hear this case but also this court is the forum conveniens for this case. The court thus finds that in the interests of all parties and the ends of justice, the *forum conveniens* in this case is the courts of Malaysia.

THE PLAINTIFF'S CASE

[19] The evidence in support of the plaintiff's case is presented through Toh Eng Yeow ('PW1'), its sole witness. PW1 is the senior account relationship manager in the plaintiff bank and had held the post for the previous 15 years. Apart from his job scope of granting facilities to corporate clients, he also managed some of the non-performing loan accounts and was authorised to give evidence in this case based on the books and records of the plaintiff.

[20] According to PW1, the defendant was a customer of the plaintiff who was introduced by Wee Boon Ping to the plaintiff's former general manager, Mr Zhou Zhigong ('Zhou') in 1982/1983. Zhou left Singapore in 1997 or 1998 after he retired and has since passed away on 31 January 2004. At the material time, Lin Juzheng ('Lin') was the deputy general manager of the plaintiff bank. He has since retired and now lives in China. Although PW1 had not asked Lin Juzheng to come to Malaysia to give evidence, he did contact him to enquire more about the loan to the defendant.

[21] PW1 described in detail about the overdraft facilities which were granted to the defendant:

(a) Pursuant to a facility letter dated 8 February 1993, the plaintiff granted to the defendant an overdraft facility of USD4.5m (pp 12–13 of CBD1). As

the facility was granted following the defendant's formal written application dated 12 January 1993, this facility would have taken almost a month to approve.

(b) Vide a letter dated 10 March 1993, the defendant requested for an additional facility of USD4.5m (p 14 of CBD1). Vide a letter dated 12 April 1993 (pp 16–18 of CBD1), the plaintiff approved an additional facility of USD4.5m thus bringing the total of the overdraft facilities to USD9m. This facility also took about a month to be approved.

(c) Vide a letter dated 9 November 1994, the defendant requested for an additional overdraft facility of USD3m (p 22 of CBD1) which request was granted through facility letter dated 11 November 1994 (pp 71–73 of CBD1) and amended through its letter dated 22 November 1994 (pp 74–75 of CBD1). This facility took three days to be approved. The two facility letters were signed by Poh Seng Say who was then the manager of the credit and marketing department. He resigned in 2006 and currently resides in Singapore. According to PW1, the said Poh Seng Say has refused to come to court to give evidence.

[22] Questions were asked as to whether the defendant had signed the plaintiff's letter of 11 November 1994 to signify his acceptance of the terms and conditions contained therein. It was suggested that the defendant had not signed and as such the plaintiff had no basis for claiming on the facilities in the third letter of offer. This suggestion was strenuously denied by PW1 who pointed out that the plaintiff had received a letter from the defendant dated 11 November 1994 (p 23) where he had accepted the terms and conditions. It was further argued that the terms and conditions in the letter of offer dated 22 November 1994 were the same as in the original letter of offer dated 11 November 1994. The court notes that the defendant had clearly accepted the terms and conditions of the letter of offer dated 22 November 1994 on 28 November 1994 as evidenced by his signature on the said document itself.

[23] PW1 explained the steps taken in processing an application for additional facilities. The second facility took a month because the defendant was asking for an additional USD4.5m and a report had to be prepared which would then go through a committee for approval. For the third facility, which was alleged to have been approved abnormally fast, PW1 explained that the USD3m was earmarked from the USD9m and there was an additional security in the form of a personal guarantee from Wee Boon Ping. As such, there was no change in the plaintiff's exposure. Furthermore the USD3m was a short term loan of six months. It was because of the aforestated reasons that this facility could be approved so fast.

[24] It is PW1's evidence that the Ganda and Samanda shares were already pledged to the bank at this time. Despite being referred to the memorandum of charge over securities made on 5 December 1994, he denied that there were no shares pledged with the bank in November 1994. He believed that the bank had the shares or else they would not have allowed the defendant to utilise the facilities.

[25] In answer 9 of his witness statement, PW1 had testified at length as to the terms and conditions of the overdraft facilities that were granted to the defendant. The salient terms and conditions are stated as follows:

(a) an overdraft facility of up to USD9m disbursed through account No 1 repayable on demand;

(b) an overdraft facility of up to USD3m disbursed through account No 2 to be retired on or before the expiry of six months after the date of the first drawdown or on demand;

(c) interest at the rate of 1.25%pa above the plaintiff's US prime lending rate ('PLR') calculated daily with monthly rests based on 360 days a year; interest at the rate of 2%pa above the prescribed rate on amounts overdrawn in excess of the approved overdraft limit;

(d) the amount of overdraft that may be utilised at any one time ('the utilisation limit') shall be based on a percentage of the prevailing market value of the shares charged or offered as security to the plaintiff as set out in all the facility letters and in the plaintiff's letters dated 21 September 1996 and 18 October 1996;

(e) the facilities may be reviewed from time to time at the plaintiff's discretion and the plaintiff reserves the right to cancel, amend or vary all or any of the terms and conditions without prior notice to the defendant;

(f) any statement signed by the plaintiff's officer as to the liability or money due or owing to the plaintiff by the defendant may be adduced by the plaintiff and shall be accepted by the defendant as conclusive evidence that the amount therein appearing is due and owing to the plaintiff from the defendant, save for manifest error;

(g) without prejudice to the plaintiff's right to demand for payment of the overdraft facilities at any time, the following shall constitute events of default whereupon the whole of the facilities and interest charges and all other monies due and owing shall immediately become due and payable immediately:

(i) if the defendant fails to pay any amount under the banking facilities (including interest and any other sum due) on its due date or on demand; and

(ii) if the defendant commits a breach of any of the terms or conditions of the facilities.

[26] PW1 also testified that the securities were secured, inter alia, by charges of shares in various Malaysian companies executed by the defendant in favour of the plaintiff by memorandums of charge dated 5 December 1994 and 9 September 1998. The charged properties were registered in the name of the Bank of China Nominees (Pte) Ltd. There was also an additional security for the USD3m overdraft in the form of a personal guarantee executed by Wee Boon Ping.

[27] PW1 also led evidence as to the operation of the overdraft facilities. The existing limit for account No 1 was USD9m whilst that for account No 2 was USD3m. The USD3m for account No 2 was earmarked from account No 1 and as such the effective overdraft limit for account No 1 during the subsistence of account No 2 was only USD6m. Upon the expiry of account No 2, the effective overdraft limit under account No 1 would be restored to USD9m.

[28] PW1 was cross-examined about the total facility that was enjoyed by the defendant. Initially, he told the court that the USD3m was an additional facility and that the total facility was USD12m. However, when queried further about the earmarking arrangement where the USD3m would come from account No 1, he agreed that there was in effect no additional facility of USD3m.

[29] Account No 2 was for a term of six months only from the date of the first drawdown and was also secured by a personal guarantee from Tan Sri Wee Boon Ping. However various extensions were granted at the defendant's requests and the facility was extended first to 18 September 1995, then to 18 December 1995 and finally to 30 October 1996 or on demand. The overdraft facility in account No 2 was granted solely to the defendant and disbursed to the order of the defendant. On 11 November 1994, the defendant instructed the plaintiff to remit USD3m to SS Banken New York for SS Banken Singapore favoring Raffles Money Changers Pte Ltd which instruction was adhered to by the plaintiff.

[30] Vide a letter dated 11 September 1996, the defendant wrote to the plaintiff to inform that he wished to close account No 2 and to transfer the amount owing to account No 1 (p 45 of CBD1). The defendant's instructions were duly carried out. PW1 was asked about the effect of the consolidation of the two accounts on the personal guarantee of Wee Boon Ping. His response was the guarantee was not released. The amount outstanding in account No 1 just before the consolidation is USD2.7m whilst that outstanding in account

No 2 is USD3.4m. Although the plaintiff could consolidate the two accounts, however the account would become overdrawn.

[31] PW1 denied the existence of any special arrangement in relation to the overdraft of USD3m. The overdraft was granted to the defendant at the defendant's request and he believed that the plaintiff and its officers, in particular Zhou Zhigong and Lin Juzheng, had never entered into any private arrangement with any party in relation to this USD3m overdraft facilities. He pointed out during cross-examination that Zhou Zhigong had affirmed an affidavit in 2001 denying any special arrangement with Wee Boon Ping and the defendant. Zhou Zhigong has since passed away. He went on to say that even if there was a special arrangement, it was exclusively between the defendant and Wee Boon Ping. Reference was made to the undated letter from Wee Boon Ping to the defendant (p 6 of CBD1) where he states that the remittance to SB Banken New York was at his request and that *he undertook full responsibility*. It was also stated that *the remittance was to be treated as the defendant's personal loan to him which would be repaid in full within three months*.

[32] Through cross-examination, it was established that when the third facility was granted, the amount outstanding in account No 1 was UDS2.7m. However, the amount available for the defendant's utilisation is unclear because that would depend on the value of the shares at that time. However from the statement of account as at 21 September 1994, it can be established that the effective limit was USD3.4m.

[33] PW1 denied that the plaintiff had used the overdraft facility of USD3m as a conduit for giving banking facilities to Wee Boon Ping. If Wee Boon Ping had wanted to obtain banking facilities, he could have obtained them directly from the plaintiff. PW1 tendered Tan Sri Wee Boon Ping's statements of accounts to evidence that the account was never blacklisted or classified as non-performing.

[34] PW1 complained that the defendant did not manage his overdraft facility well. He exceeded his approved authorisation limit and had to be told to rectify the situation. Material evidence was led through a series of correspondence between the parties as follows:

(a) Vide a letter dated 30 September 1998 (p 91 of CBD1), the plaintiff informed the defendant that his current account was in excess of USD4,325,146.28 and required him to settle the said amount together with accrued interest within 14 days.

(b) In response to that letter of demand, the defendant vide his letter dated 6 November 1998 (p 62 of CBD1) sent a cheque of S$100,000 'being

payment towards my account'. In this letter, he also confirmed that 'I can settle the amount owing by me within a year or two'.

(c) Vide its reply dated 19 November 1998 (p 92 of CBD1), the plaintiff informed the defendant that the S$100,000 had been credited into his account and that the outstanding balance was USD4,331,714.20. It further required the defendant to furnish precise terms of settlement within 14 days.

[35] It is the plaintiff's case that the defendant had never asked the plaintiff to go after Wee Boon Ping instead of him for the monies outstanding. The plaintiff contends that the defendant had always admitted in his letters that he regretted owing the plaintiff and being unable to make payments promptly. Examples of these letters appear as follows:

(a) In his letter written in Chinese dated 14 October 1996 (pp 46–49 of CBD1), the defendant admitted that his 'account has an amount due and owing of approximately USD4.8m' and that he would 'sell a large portion' of his Sanda shares to reduce the debt.

(b) In his letter dated 22 January 1997 (pp 50–51), also written in Chinese, the defendant apologised for being unable to fulfill his promise of repaying the loans to the plaintiff by the end of the previous year.

(c) In his letter dated 6 November 1998 (p 62), the defendant expressed his regret that his account 'has become a problem to your esteemed bank'.

(d) In his letter dated 8 December 1999 written in Chinese (pp 65–66), the defendant admitted that his account was long overdue and again apologised for the inconvenience caused to the plaintiff. He estimated that he 'should be able to settle my portion of debt with your Bank' by the middle of the next year. This letter also contains a reference to a 'Mr Wee' in the following context:

> Regarding the portion of the late Mr. Wee, I have discussed with his son Wee Kok Chong, within a month, both of us will go to your Bank to discuss a solution.

[36] PW1 pointed out even though there may be a reference to Wee Boon Ping using the facilities, the defendant had never placed any fault on Wee Boon Ping or asked the plaintiff to go after Wee or his estate. On the contrary, the defendant had in his letter dated 13 June 2000 (pp 68–69) stated that 'I could have fully settled my outstanding including Tan Sri Wee's portion in 1996 but I missed the opportunity three times owing to my misjudgment and late decision'. And in that same letter, the defendant had clearly stated that 'I am fully aware that your Bank was not liable to my private arrangement with Tan Sri Wee'. He amplified that the words 'private arrangement' refers to the

arrangement between him and Tan Sri Wee with the understanding of the bank. The court finds this communication of the defendant to be most telling.

[37] The plaintiff's Singapore solicitors sent several letters of demand to the defendant. Although the defendant gave the plaintiff the impression on several occasions that he would settle the outstanding amounts within a short period of time, his promises were not honored. Although the plaintiff's lawyers had written to the defendant a number of times threatening to sell the pledged shares and take legal action against the defendant if he failed to pay the outstanding sum demanded within 14 days, the threats were not carried out because the defendant had written promising to settle the outstanding sum with a little bit of time. He agreed that it 'could be' that the losses would not have been so great if the plaintiff had sold the shares then. However PW1 disagreed that the plaintiff had sold the shares unlawfully. The various letters which the defendant had written asking for time appears at pp 51, 53, 62, 63, 66, 67, 68 and 69 of CBD1.

[38] PW1 told the court that the plaintiff had to date sold 3,370 Westmont Land (Asia) Bhd shares as well as 1,356,000 shares of WTK Holding Bhd to reduce the defendant's indebtedness. The shares were sold at market value. In any event, there was no agreement as to when the shares could be sold and no legal obligation on the plaintiff to sell the shares at any particular time or at market value. Pages 119–123 of CBD1 show the sale transactions of the WTK shares and the amounts received.

[39] PW1 tendered a certificate of outstandings ('P1') which states that the amount outstanding as at 1 August 2000 is USD5,162,837.32. Interest would also continue to run from 2 August 2000 on the sum of USD897,389 at the rate of 1.25%pa above the bank's USD prime lending rate and at the rate of 3.25%pa above the bank's USD prime lending rate on the sum of USD4,263,670.30 until the date of full payment. The rate of 1.25%pa is for the amount within the utilisation limit whereas the rate of 3.25% is the rate charged for the amount in excess of the utilisation rate. When P1 was signed, all the shares pledged to the plaintiff had been sold as evidenced by the cover note and invoices as at p 89 and pp 119–123.

[40] PW1 also tendered a certificate dated 12 August 2010 ('P2') signed by himself certifying that to the best of his knowledge and belief, the statement of accounts from 15 February 1993 to 31 March 2001 and the share revaluation detailed report (p 118) dated 1 October 2001 for Ngan Ching Wen were produced by a proper system in the plaintiff's office and in the ordinary course of the plaintiff's business. The management of the accounts department is in charge of the running of the proper system in this case and there were no complaints about the workings of the computer in the accounts department.

The share revaluation detailed report would show the number of shares held by the plaintiff and the market value of the shares. The column under 'Market Value in A/C CCY EQUIV' is the utilisation limit.

[41] In the course of cross-examination, PW1 testified that he did not know if the defendant was helping the plaintiff to get a licence.

THE DEFENDANT'S CASE

[42] The defendant, Tan Sri Ngan Ching Wen ('DW1') was a qualified lawyer and had practiced law for four to five years before he became a businessman. In his witness statement, he states that on 12 January 1993 he applied to the plaintiff, a bank based in Singapore, for a loan and that he subsequently received a letter of offer dated 8 February 1993 from the plaintiff approving an overdraft of USD4.5m, which offer he accepted. On 10 March 1993, he applied for an increase of his overdraft from UDS4.5m–USD9m. This was approved by the plaintiff vide its letter dated 12 April 1993 which offer was accepted by the defendant.

[43] The court notes that when testifying in court, the defendant's timeline as regards his first loan application changed quite substantially. In court, he said that his loan application was submitted in early March 1993 (compared with 12 January 1993 in his witness statement) and that the approval came in early January 1994 (compared with 8 February 1993). The court finds this big discrepancy as to the dates of application and approval of the first facility to be somewhat baffling.

[44] The defendant told the court that in November 1993, he was approached by the late Tan Sri Wee Boon Ping for a personal loan. In a telephone conversation between them, Tan Sri Wee told him that he knew the defendant had facilities in excess of USD5m that was still not drawn upon and he asked for the use of USD5m for a period of three months. The defendant told Tan Sri Wee that he was not in a position to give him the loan as he needed the money for his own use.

[45] Tan Sri Wee was the President of the Chinese Chamber of Commerce of Malaysia ('ACCCIM') and the defendant was the secretary general. According to the defendant, Tan Sri Wee had a personal as well as a business relationship with the plaintiff. At the material time, the plaintiff did not have a branch in Malaysia and Tan Sri Wee was assisting the plaintiff 'by playing a key role in obtaining a licence to operate in Malaysia'. By 'playing a key role', what he meant was that Tan Sri Wee arranged for the plaintiff to meet the relevant persons involved in the approval of their banking licence in Malaysia.

[46] It is the defendant's evidence that he had 'never' applied for any further facility from the plaintiff as he was not in need of any further facility and his exposure was sustainable. In relation to his letter dated 9 November 1994 asking for an additional loan of USD3m, he explained that following his refusal to allow Tan Sri Wee the use of his excess facility, Tan Sri Wee had called him again from Singapore. Apparently, Tan Sri Wee had discussed and agreed with the plaintiff that the plaintiff would assist him for a sum of USD3m using the defendant's account. The adjustment of the aggregate from 65%–75% of the market value of the defendant's shares was necessary so that he could have more cash.

[47] As to why the plaintiff had to resort to this arrangement to give the late Tan Sri Wee a loan, it is the defendant's evidence that he was told by the late Zhou Zhi Gong, the then general manager of the plaintiff, that Tan Sri Wee's accounts were all deemed to be non-performing and as such the plaintiff could only assist him in this manner by using the defendant's account as a conduit and backing it up with a personal guarantee from Tan Sri Wee. However, when the defendant was referred to Tan Sri Wee's statement of accounts (pp 37–40 of CBD2) which cover the period from July 1994 to December 1995, he agreed that Tan Sri Wee's accounts were still operational during the said period and not non-performing as alleged.

[48] The defendant sought to explain that he agreed to open account No 2 based on Zhou's assurance that the plaintiff would not be looking to him for repayment of the loan. Since the plaintiff could not find any other manner to assist Tan Sri Wee, the opening of account No 2 served as a way for funds to be made available to Tan Sri Wee. The defendant claimed that he was 'coerced to agree to the use of Account No 678 for Tan Sri Wee as suggested by the Plaintiff by the creation of Account No 2'. The court notes his comment that the borrower is in a weaker position and he was worried that the plaintiff might withdraw his loans if he did not agree.

[49] What happened next was that the letter of offer from the plaintiff dated 11 November 1994 was brought to him in Kuala Lumpur by Tan Sri Wee. He identified the letter at pp 71–73 of CBD1 as the said letter of offer. Tan Sri Wee also brought with him the personal guarantee to be executed by him (Tan Sri Wee) personally and also a sample letter of instructions to remit the monies to SS Banken New York which was to be typed on the defendant's letterhead. He identified the letter on p 23 of CBD1 as the letter that was typed on his letterhead. The letter was given by him to Tan Sri Wee because it was the latter who had made arrangements with the plaintiff to get the loan of USD3m. He claimed that *no account was opened* subsequent to the plaintiff's letter of offer.

[50] Although the letter asking for the disbursement of the USD3m to SS Banken New York was admittedly signed by the defendant, he nevertheless disagreed that the said disbursement was made following his instructions. He would have the court believe that he signed the instructions at the request of the plaintiff. When queried as to whether he had documentation to substantiate his evidence, he gave the inexplicable answer that there was a letter from Wee Boon Ping. When pressed further on how a letter from Wee Boon Ping could amount to a request from the plaintiff bank, his answer was 'I treated Wee Boon Ping as a Bank'. Although he sought to clarify during re-examination that what he meant was that between 1994–1995, Wee Boon Ping was so close to the bank that whatever promises to the defendant were all carried out, the court confesses to an inability to comprehend how someone whom the defendant regarded as a bank and who had the powers and influence of a bank would have to borrow money from the defendant.

[51] In his witness statement, the defendant testified that the plaintiff's letter of offer dated 11 November 1994 (pp 71–73 of CBD1), which approved a short term overdraft facility of UDS3m to be disbursed through account No 2, earmarked from the existing overdraft of USD9m in account No 1 plus a personal guarantee from Wee Boon Ping, clearly shows that the funds were meant for the sole use of the said Wee Boon Ping. The defendant went on to say that although he was obliged to the plaintiff for its assistance, however he did not agree to be burdened with the responsibility of repaying what was enjoyed by Tan Sri Wee. The court notes the defendant's claim that no account was opened for the USD3m. When asked how then was account No 2 operated, he gave the following response:

> The whole arrangement was directed by the bank officer. They wanted me to do this and do that. And so I do. I complied with the bank's requests. To me, the bank's request amounts to a command.

It is his evidence that he had never operated account No 2 and that it was 'all controlled by the Bank'. He denied that he made the withdrawal of USD260,000 as shown in the statement of account for account No 2 (p 20 of CBD2).

[52] In court, the defendant was asked why he had put himself through such great risk. The court records the following answer:

> To me as a businessman, we trust the Bank because the senior people in the Bank of China were very kind to me. They gained my respect so much that I treat the Bank as a business partner. So when they want me to do something — with my ability — I just comply.

And when he complied with their requests, he claimed that Lim Ju Zheng gave him the following assurance:

A You do not need to worry about the repayment. The Bank will take care of it because Wee Boon Ping was very helpful to the Bank. So, if anything happens, the Bank will take care of the Wee Boon Ping loan.

B **[53]** The defendant admitted that he was Tan Sri Wee's business partner for one or two business transactions before 1994 and that they had taken over Sim Lim Finance together. However, he denied that he owed Tan Sri Wee any money. He also insisted that Tan Sri Wee did not help him in any way. In these circumstances, the question arises as to why the defendant would allow Tan Sri C Wee to take USD3m from his account. His explanation was that the vision of the Chinese Chamber of Commerce was to help the Chinese Government to obtain a licence to establish the Bank of China in Malaysia. It was because of that that 'I gave him USD 3 million from my account to do the bribery'. He went on to say that in any event, 'the money was from the bank and not from D me. It was not my money. I was only the messenger boy or conduit in the whole exercise'. He explained that by 'bribery' what he meant was that Tan Sri Wee needed the money to lobby around for the bank to obtain a licence in Malaysia.

E **[54]** In court DW1 claimed that he understood the plaintiff's letter dated 11 November 1994 to mean that the total facility was USD9m + USD3m = USD12m. As the market value of his shares was less than USD6m, he could use USD3.6m.

F **[55]** The defendant pointed out that this third facility was approved extremely fast. Whereas his own loans had taken about a month to approve, the loan to Tan Sri Wee was not only approved expeditiously but it was also drawn down expeditiously. The monies were drawndown on 14 November 1994, four days after Tan Sri Wee met the defendant at the latter's office in Kuala Lumpur.

G **[56]** According to the defendant, when he asked Tan Sri Wee about the outstanding loan which was earmarked from his account, he was told not to worry as he had already agreed with the plaintiff to write it off or else they would only look towards Tan Sri Wee for repayment.

H **[57]** As regards his request vide his letter dated 11 September 1996 for the consolidation of account No 1 with account No 2, the defendant said that he had no choice but to do so as Zhou Zhigong had told him that if he did not do so, his account FCA 678 would be affected and placed as a non-performing I account. Although he insisted that he had asked for the two accounts to be consolidated at the request of the plaintiff bank, he agreed that there was nothing in his letter which states that he did so at the request of the plaintiff. His statement of account as at p 104 would show that as at 1 September 1996, the defendant owed the plaintiff a sum of USD2,796,841.21 in account No 1.

[58] A very interesting and pertinent question asked was why the defendant had not mentioned anything about Tan Sri Wee using part of the monies in his account before he passed away and why he had only voiced this issue after the latter had passed away. To this question, the defendant had given the following answer:

> Circumstances changed because of my personal financial ability and capacity.

From this, the court gathers that the defendant had only raised the issue about Tan Sri Wee using his monies because of his reduced financial position. Although he claimed that he had alleged in writing to the bank that half the monies was owed by Tan Sri Wee before the latter's death, he was unable to produce the letter in court.

[59] The defendant testified that the plaintiff had not enforced the personal guarantee given by Tan Sri Wee because it had not looked towards the defendant for any form of repayment until after Tan Sri Wee passed away. He complained that as a result of the foregoing, he had suffered losses when the plaintiff sold his Ganda and Samanda shares at a time when prices were low.

[60] The defendant was referred to various letters written by him to the plaintiff in relation to his accounts. With reference to his letter dated 14 October 1996 (pp 46–49 of CBD1) in which he had admitted that his 'account has an amount due and owing of approximately USD 4.8 million' and that he would 'sell a large portion' of his Sanda shares to reduce the debt, his evidence during examination-in-chief was that he had written the letter *at the request of the bank* who claimed that they had to answer to the Monetary Authority of Singapore as there were queries about the account. However, during cross-examination he admitted that no one from the Bank of China had commanded or requested him to write paras 2, 3 and 4 of that letter. Similarly, whilst he had testified during examination-in-chief that his letter dated 22 January 1997 (pp 50–51) in which he had apologised for being unable to fulfill his promise of repaying the loans to the plaintiff by the end of the previous year was also written at the request of the bank, however during cross-examination, he made an about turn when he said that no one had asked him to write that letter. And in relation to a letter at p 52, which was his letter to Tan Sri Wee dated 26 December 1997, in which he had made reference to a sum of about USD2m used by Tan Sri Wee from the defendant's account and asking for some repayment or items to be charged, the defendant explained that the bank was asking for payment and that was why he wrote to Tan Sri Wee. When asked about why he should write to Tan Sri Wee about an account in his own name, the defendant gave the following very telling answer:

> I lent Wee Boon Ping the money under my name designed and engineered by the bank officer.

When asked about the discrepancy between the above evidence that he had lent the money to Wee Boon Ping compared with the evidence in his witness statement where he had claimed that the USD3m was given to Wee Boon Ping by the plaintiff using the defendant's account, his clarification was:

> When I say I lend, I mean that Wee Boon Ping was using the money from my account and more or less equivalent to I lent it to him.

[61] The defendant was referred to three letters dated 6 November 1998 (p 62), 10 February 1999 (p 63) and 8 December 1999 (p 66) which he had written to the plaintiff. He explained that when he wrote these letters, he was thinking of ways to help the bank and to cause them less trouble as it had been very kind to him in the early years. He claimed to know the banking regime in Singapore where the plaintiff was controlled by the Monetary Authority of Singapore. He knew that he had caused trouble to the plaintiff and thus he went to the bank every now and then to discuss the settlement. When asked why in his letter dated 13 June 2000 (p 68), he had written, inter alia:

> The other reason which you may take into consideration is that half of the outstanding sum in this account was lent to Tan Sri Wee (now deceased). This is the fact *I am fully aware that your bank was not liable to my private arrangement with Tan Sri Wee*.

The defendant again sought to explain it away by saying that he wrote the above 'at the request of the Bank'.

[62] Initially, the defendant testified that he did not receive any monthly statements from the plaintiff although he subsequently qualified that to not receiving statements regularly. When asked how he would know how much to pay if he did not receive statements, his response was that he would 'make a call to Singapore and a person from the Accounts Department will tell me'. When asked further as to why he did not make any complaints to the plaintiff about them not sending him bank statements, his answer was: 'I have full confidence in the Bank of China and their accounts.' When pressed further as to why he had not paid the plaintiff the sum of USD9,724,776.38 claimed by them, his response was that that was not the sum owing by him. And finally, when asked whether the figure claimed was wrong, his answer was an unfathomable 'Don't know whether it is wrong or not'.

[63] The defendant in his amended defence had alleged that the plaintiff committed fraud, money laundering and breached banking regulations. Admittedly he did not make any complaint of money laundering to the authorities. In relation to this issue, the court notes a number of rather strange and unbelievable statements. He did not know that failure to report a crime is a crime. He was not worried that USD3m was laundered through his account

because 'the Bank is behind me'. He did not know the consequences of aiding and abetting money laundering. And all this evidence is from a Tan Sri with a legal background!

[64] The defendant called Tan Sri Dato' Lim Guan Teik ('DW2') as his witness in support of his case. DW2 was a former classmate of the defendant who had known the defendant for over 50 years. Between 1985 and 2000, both the defendant and DW2 were holding various positions in various Chinese Community Associations including the Associated Chinese Chamber of Commerce and Industries of Malaysia (ACCCIM). As such, he also knew Tan Sri Wee Boon Ping, a previous President of ACCCIM.

[65] DW2 also knew the plaintiff and had contact with some of its officers over the years. He named Tay Kok-Leong, Zhang Lianli, Lin Ju-Zheng, Zhu Hua, Wang Zuebing and Zhou Zhi Gong as some of the plaintiff's officers that he knew. He became acquainted with them during their visits to Malaysia for discussions with ACCCIM and the Ministry of Finance. He claimed that he could remember this as it was a momentous occasion for the Chinese community because the Bank of China was making an application to reinstate their banking licence in Malaysia and this would open numerous business opportunities between the business communities of China and Malaysia.

[66] According to DW2, he had knowledge that Tan Sri Wee was instrumental in assisting the plaintiff in their application for the reinstatement of their banking licence, which licence was subsequently reinstated sometime in 1999.

[67] The founding members of the Bank of China, Malaysia were Tan Siak Tee and DW2 himself. In fact he was a shareholder of the Bank of China Malaysia. He told the court that he was an independent director and had also held the position of chairman of the audit committee until his retirement in June 2010. He had sold his shares before he became an independent director.

[68] When DW2 was referred to p 71 of CBD1 and the provision on 'facilities', he testified that the amount of facility granted to the defendant was USD12m. Referring to the clause on 'Earmarking Arrangement', he told the court that the total amount of facility granted to the defendant was USD9m. Thus, reading the two provisions together, the total facility granted to the defendant was only USD9m as the total utilisation limit was not increased. However during cross-examination, he admitted that prior to the preparation of his witness statements, he had not seen pp 71–72 before and did not know about the earmarking arrangement. It was a Mr Ng who had told him about the said arrangements.

A EVALUATION OF THE EVIDENCE AND FINDINGS

[69] The court has carefully considered the evidence adduced by both parties and perused all the relevant documentary evidence tendered in court in support of their case. In coming to a decision, the court has derived considerable assistance from the written submissions and authorities submitted by both parties.

[70] It is an agreed fact that the plaintiff had granted banking facilities to the defendant in the form of overdraft facilities. Vide the plaintiff's facility letter dated 8 February 1993, the defendant was granted an overdraft facility of USD4.5m. Vide a subsequent facility letter dated 12 April 1993, the defendant was granted an additional overdraft facility of USD4.5m, thus making a total overdraft facility of USD9m. It is an agreed fact that the overdraft of USD9m was operated through account No 1.

[71] The court notes that in his amended statement of defence, the defendant has pleaded that the plaintiff was not licensed to conduct banking business in Malaysia. The defendant also contends that all three overdraft facilities extended to him offends the provisions of the Exchange Control Act 1953, the Banking Ordinance 1958 and the Contracts Act 1950 and that such contracts are illegal, void and not enforceable in Malaysia.

[72] The plaintiff's response is that it did not conduct banking business in Malaysia. In his submissions, learned counsel for the plaintiff referred the court to the case of *Banque Nasionale de Paris v Wuan Swee May & Anor* [2000] 3 MLJ 587. In that case, the first defendant who was a Malaysian citizen had obtained a foreign currency short term loan from the plaintiff, a bank in Singapore. Documentations were sent to the first defendant in Kuala Lumpur for execution, the second defendant executed the guarantee documents for the loan in Kuala Lumpur and the first defendant deposited stocks and shares with the plaintiffs nominees in Singapore.

[73] The plaintiff obtained judgment against the defendant in Singapore and duly registered the judgment of the Singapore High Court in Malaysia. The defendant applied to set aside the order registering the judgment against her on the ground that enforcement of the judgment would be contrary to public policy. In dismissing the defendant's application, Abdul Hamid Mohamad J (as His Lordship then was) found that the plaintiff had neither a branch nor office in Malaysia. The facts that the plaintiff's vice president approached the defendant to open an offshore account with the plaintiff's Singapore branch and the necessary documents for the opening of the account and the loan were all sent to Kuala Lumpur for signature by the defendant and were signed in Kuala Lumpur were insufficient to support the contention that

the plaintiff carried on banking business in Malaysia. The court found that the plaintiff had not breached the provisions of BAFIA.

[74] Thus, applying the case of *Banque Nasionale de Paris* to the facts of our instant case, the court is of the view that the plaintiff cannot be construed as having carried on banking business in Malaysia. There is no evidence before the court that the plaintiff had ever collected deposits in Malaysia.

[75] Whilst there is little issue in relation to the first and second overdraft facilities, problems arise when considering the third overdraft facility of USD3m. The first consideration is, of course, whether the overdraft of USD3m is in addition to the USD9m already granted to the defendant.

[76] Based on the evidence adduced, the court finds that the offer of the overdraft facility of USD3m was preceded by the defendant's letter of 9 November 1994. Upon a careful perusal of this letter, the court finds that this letter bears the defendant's letterhead and his signature. It contains a request from the defendant for an adjustment of the aggregate market value of the Ganda and Samanda shares pledged for an additional loan of USD3m. The defendant also states his agreement to open account No 2 and that Tan Sri Wee would give a personal guarantee towards this account No 2.

[77] In response to the above request, the plaintiff issued a letter of offer dated 11 November 1994. The court has carefully perused this letter of offer and finds the following terms and conditions to be very pertinent and relevant:

(a) the letter of offer was in response to the defendant's letter;

(b) the banking facility was granted subject to the terms and conditions stated therein and the general terms and conditions governing banking facilities attached thereto;

(c) the overdraft of USD3m was to be retired in full on or before the expiry of six months after the date of the first drawdown or on demand;

(d) the overdraft facility of USD3m was earmarked from the existing USD9m and to be disbursed through account No 2. Following the retirement of the overdraft facility of USD3m, the effective limit of the existing facility shall revert to USD9m;

(e) Wee Boon Ping was to execute a personal guarantee for USD3m; and

(f) the utilisation limit shall be based on 75% of the market value of the Ganda and Samanda shares charged as security with a proviso that the utilisation limit shall not exceed USD9m or the effective limit.

[78] Based on the terms and conditions in this letter of offer, the court is satisfied that notwithstanding PW1's initial evidence that the total facility that was enjoyed by the defendant was USD12m, which he subsequently corrected, the total amount of overdraft facilities that was enjoyed by the defendant was only USD9m. One may well ask: what is the benefit of this arrangement to the defendant? Will he suffer a reduction in his utilisation limit since the USD3m is earmarked from his account No 1? The court finds that the answer may well lie in the increase in the utilisation limit. Bearing in mind that at the material time the defendant had only an outstanding overdraft position of about USD2.7m, taking into account the increase in the utilisation limit from 65%–85% of the market value of the shares charged as well as the fact that this overdraft of USD3m was a short term facility of only six months, the granting of this overdraft facility, had the facility been managed properly by the customer, would not have an adverse effect on the defendant's ability to utilise his overdraft facilities.

[79] The court finds that the defendant's contention that the plaintiff had no basis in claiming on the facilities in the third letter of offer dated 11 November 1994 because he had not signed on it to signify his acceptance to be totally without merit. The court finds that the defendant's own letter, also dated 11 November 1994, wherein he had made a drawdown of USD3m, had clearly alluded to his acceptance of the facility. The court finds that this fact, together with the defendant's signature on the letter dated 22 November 1994 amending the terms and conditions of the facility offer, clearly points to the defendant not only having accepted the terms, but also utilising the facilities.

[80] It is the plaintiff's case that this is a simple banking transaction. The documents before the court shows that the defendant applied for banking facilities on 12 January 1993, 10 March 1993 and 9 November 1994 and was granted banking facilities and additional facilities, that he accepted the various letters of offer dated 8 February 1993, 12 April 1993 and 11 November 1994 (subsequently amended vide letter on 22 November 1994), with all their attendant terms and conditions and that he used the said facilities.

[81] The court finds that as stated in the letters of offer, the banking facilities were granted subject not just to the terms and conditions contained in the said offer letters but also the plaintiff's general terms and conditions governing banking facilities. The court finds that in accepting the plaintiff's letters of offer, the defendant had also clearly indicated his acceptance of the plaintiff's general terms as indicated by the appending of his signature thereon.

[82] The court notes the existence of a conclusive evidence clause in the general terms which reads as follows:

Conclusive Evidence of Outstanding Amount

Any statement signed by an officer of the Bank as to the money or liability for the time being due or owing or incurred to the Bank from the Borrower may be adduced by the Bank and shall in that case be accepted by the Borrower as conclusive evidence that the balance or amount appearing is due or owing to the Bank from the Borrower, save for manifest error.

[83] In this case, PW1, an officer of the plaintiff has tendered a certificate of outstandings (P1) which states that the amount outstanding as at 1 August 2000 is USD5,162,837.32. Interest would run from 2 August 2000 on the sum of USD897,389 at the rate of 1.25%pa above the bank's USD prime lending rate and at the rate of 3.25%pa above the bank's USD prime lending rate on the sum of USD4,263,670.30 until the date of full payment. Relying on the case of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, the court finds that the existence of the exclusive evidence clause is sufficient to prove the amount of indebtedness of the defendant in the absence of evidence of any manifest error on the certificate.

[84] Accordingly the court finds that based on this certificate of outstandings and the evidence adduced for the plaintiff, that the plaintiff has proved the existence of facts in favour of its case. As such, in line with and following the decision in *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 and *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697, the burden shifts to the defendant to discharge the burden of proof.

[85] The defendant's case is premised on his contention that the grant of the third facility, the overdraft of USD3m, was in fact a facility granted by the plaintiff to Tan Sri Wee but using the defendant's account No 2 as a conduit. In this connection, the court notes that many allegations of illegality, impropriety, fraud and even money laundering have been alleged by the defendant. The court will deal with each of the various allegations in turn.

DID THE DEFENDANT APPLY FOR THE THIRD FACILITY?

[86] It is the defendant's contention that he had no need for the overdraft of USD3m as the balance of his overdraft facility was sufficient for his needs. The court recalls his testimony as to the approaches that were made by Tan Sri Wee to him for a personal loan. Tan Sri Wee had apparently heard of the defendant having facilities in excess of USD5m that had not been utilised and had requested for the use of the USD5m for three months. The defendant's response was that he was not in a position to give him the loan as he needed the money for his own use.

[87] As opposed to the defendant's evidence that he had never applied for any further facility as he had no need for such facility and his exposure was sustainable, the court notes the existence of the defendant's own letter dated 9 November 1994 in which he had asked for an additional loan of USD3m. The court finds that this letter is clearly an application for further additional facilities. Whilst the defendant had testified that the 'Drawdown of Banking Facility' letter was typed on his own letterhead based on a sample letter of instructions that was given to him by Tan Sri Wee, the court notes that there was no suggestion that his letter to the plaintiff asking for the additional loan was anything but his own letter. As such, if the defendant chooses to type out the sample letter on his own letterhead and sign it, he must take responsibility for his actions.

[88] As regards why the defendant had agreed to open account No 2, the court notes the various reasons given by the defendant:

(a) The assurance of Zhou that the plaintiff would not look to him for repayment. The bank would take care of the repayment as Wee Boon Ping had been very helpful to the bank. If anything were to happen, the bank would take care of the Wee Boon Ping loan.

(b) The senior people at the bank were very kind to him and gained his respect so much that he treated the bank as a business partner. So long as it was within his ability, he would comply with whatever they wanted him to do.

(c) He was 'coerced to agree' to the creation of account No 2 as the borrower is in a weaker and he was worried that the plaintiff might withdraw his loans if he did not agree.

(d) He was told by the Zhou Zhi Gong that Tan Sri Wee's accounts were all deemed to be non-performing and the plaintiff could only assist him by using the defendant's account as a conduit and backing it up with a personal guarantee from Tan Sri Wee.

[89] Can the court accept that the plaintiff, a Tan Sri and an experienced businessman with legal training, could be coerced into using his account as a conduit for giving a loan to Tan Sri Wee? Can the court believe that officers of a bank could give undertakings to write off loans because a borrower had been helpful? Based on the totality of the evidence adduced, the court finds it difficult, if not impossible, to believe that the plaintiff could have acted in the way as alleged by the defendant. Banks are the custodians of public monies and owe a heavy and onerous duty to their depositors and stakeholders to act in a cautious and prudent manner. The court finds that the defendant's allegations to be both unbelievable as well as inconsistent with his own evidence and contemporaneous documents.

[90] The court notes that the defendant had, on more than one occasion, testified to the effect that the overdraft of USD3m was his loan to or 'arrangement' with Tan Sri Wee. Reference is made to the following documents and evidence:

(a) In a letter to the plaintiff dated 14 October 1996 (pp 46–49), the defendant had admitted that he had an amount owing of approximately USD4.8m and that he would be selling a large portion of his Sanda shares to reduce the debt. He admitted that no one from the plaintiff bank had commanded or requested him to write paras 2, 3 and 4 of that letter.

(b) With reference to the letter dated 26 December 1997 which the defendant wrote to Tan Sri Wee, the defendant's evidence in court was that he had 'lent Wee Boon Ping the money under my name designed and engineered by the bank officer'. The operative words here are 'I lent Wee Boon Ping the money under my name'. The court notes his clarification that 'When I say I lent, I mean that Wee Boon Ping was using the money from my account and more or less equivalent to I lent it to him'.

(c) The very telling passage in the defendant's letter dated 13 June 2000 where he had stated that 'half of the outstanding sum in this account was lent to Tan Sri Wee (now deceased). This is the fact I am fully aware that your bank was not liable to my private arrangement with Tan Sri Wee'. There was no attempt in this letter to remind the plaintiff that he was only a conduit for the plaintiff's loan to Tan Sri Wee. On the contrary, there was a clear admission that he had lent monies in his account to the late Tan Sri Wee, that this was a private arrangement and the bank was not liable for it.

[91] Based on the above, the court finds that the defendant has failed to prove his version of events on a balance of probabilities. The court finds that the defendant has failed to show that the additional overdraft of USD3m was a loan from the plaintiff to Tan Sri Wee using the defendant's account. The court finds that the evidence adduced and contemporaneous documents and letters produced would show that it was a private loan arrangement between the defendant and Tan Sri Wee using the latter's account.

[92] The court finds from the evidence of the defendant himself that Tan Sri Wee had approached him for the use of the unutilised USD5m of his overdraft facilities for a period of three months. Although this was refused, the fact remains that the defendant was not adverse to asking for an additional USD3m as borne out by his letter dated 9 November 1994. The court does not find the fact that this third facility was approved fast, as compared with the first and second facilities, to be suspicious or to amount to proof that this facility was a loan from the plaintiff to Tan Sri Wee using the defendant's account as a conduit. In this regard, the court accepts the explanation of PW1 that the third

facility could be approved 'abnormally' fast because the USD3m was earmarked from the existing facility and did not involve an increased exposure for the plaintiff. Further, it was a short term loan only and secured by a personal guarantee from Wee Boon Ping.

[93] Notwithstanding that it may have been Tan Sri Wee who had actually utilised all or part of the overdraft of USD3m, it is the court's finding that it is the defendant who bears the responsibility for that loan. The court finds that the loan was granted to the defendant and disbursed on 11 November 1994 in accordance to the instructions of the defendant. Notwithstanding the defendant's complaint that he had typed out the letter of instruction to remit USD3m to SS Banken New York on his own letterhead following a sample letter given to him by Tan Sri Wee, the fact remains that he had done so. At the risk of repetition, the court finds that it does not lie for the defendant, as an experienced businessman with legal training, to claim that although he applied for the loan, gave instructions for the disbursement but yet is not responsible for it.

ALLEGATIONS OF FRAUD

[94] The defendant had alleged fraud on the part of the plaintiff in inducing him to open account No 2. He had complained that he did not obtain an *additional* facility of USD3m and thus did not enjoy a total facility of USD9 + 3 = 12m since the USD3m was earmarked from the USD9m. The court also notes his allegation that he did not agree to open account No 2 and that he was assured that the plaintiff would not be looking towards him for repayment.

[95] It is trite law that the standard of proof for fraud is proof beyond a reasonable doubt. As His Lordship Ian HC Chin J held in the case of *BP (Sabah) Sdn Bhd v Syarikat Jubrin Enterprise & Anor* [1996] MLJU 449; [1997] 1 LNS 354:

> ... fraud implies some base conduct and moral turpitude and a person is taken to have acted fraudulently or with intent to defraud if he acts with the intention that some person be deceived and by means of such deception that either an advantage should accrue to him or injury, loss or detriment should befall some other person. That is known as 'fraud' or 'fraudulently'.

[96] As to whether the defendant has established fraud on the part of the plaintiff, the court has looked at the totality of the evidence adduced, especially the actions of the defendant consequential to the drawdown of the USD3m. If indeed the defendant was induced by fraudulent means into opening account No 2 under the belief that he would be enjoying a total facility of USD12m, he would have voiced some protests to the plaintiff soon after he realised the true

position. The court notes that not only was there no indication of any unhappiness over the amount of the facility in the various letters written by the defendant, but the defendant's letters had, at various times, expressed gratitude to the plaintiff for the banking facilities provided, made promises to settle the sum due and owing after he had sold his shares, informed the plaintiff that he would discuss with the late Tan Sri Wee's family members about the 'half' which was used by him and apologised for being unable to make payment as promised. The court finds that these correspondences are consistent with the facilities being taken by the defendant and remaining the responsibility of the defendant even if he had allowed the late Tan Sri Wee to use part of it.

[97] The court is unable to find that the plaintiff has practiced deception on the defendant. The court thus finds that the defendant has failed to prove fraud against him on the part of the plaintiff beyond reasonable doubt.

ALLEGATIONS OF MONEY LAUNDERING AND BRIBERY

[98] The defendant has also alleged that the plaintiff committed money laundering. The court finds this to be but a bare allegation with not an iota of evidence in support of it. Suffice to say, the plaintiff did not make any report to the authorities about money laundering. The court confesses that right to the very end, it is unable to see just how money laundering featured in this case.

[99] As regards the defendant's claim that he gave Tan Sri Wee USD3m from his account 'to do the bribery' and that Tan Sri Wee needed the money to lobby around for the plaintiff to get a licence in Malaysia, the court also finds this allegation to be but a bare allegation. The defendant's allegation is that it was the plaintiff's money and not the defendant's money. The court finds that if indeed this was so and if the plaintiff had wanted to give Tan Sri Wee USD3m to lobby around and 'do the bribery', there would have been no need of using such a complicated charade as going through the defendant's account, opening account No 2 and Tan Sri Wee having to give a personal guarantee. The court finds this allegation to be farfetched in the extreme and not proved.

[100] It is an agreed fact that as security for the facilities, the defendant had, by way of a memorandum of charge over securities dated 5 December 1994, pledged or charged to the plaintiff shares owed by the defendant which included shares in Ganda Holdings Bhd and Samanda Holdings Bhd. The charged properties were registered in the name of the Bank of China Nominees (Pte) Ltd.

[101] Evidence was led as to several letters of demand having been sent to the defendant. The latter had renegade on several promises to pay. The plaintiff's lawyers had written to the defendant a number of times threatening to sell the

pledged shares and take legal action against the defendant if he failed to pay the outstanding sum demanded within 14 days but the threats were not carried out. PW1 had explained that this was because the defendant had written promising to settle the outstanding sum with a little bit of time. In any event, according to PW1, the plaintiff had sold 3,370 Westmont Land (Asia) Bhd shares as well as 1,356,000 shares of WTK Holding Bhd to reduce the defendant's indebtedness. The shares were sold at market value.

[102] The defendant's complaint is that the plaintiff had sold the shares unlawfully. Whilst it may be true that the losses might not have been so great if the plaintiff had sold the shares earlier, however does that make the sale of the shares unlawful?

[103] The court notes that cl 12.1 of the memorandum of charge over securities states, inter alia, as follows:

> ... you are at liberty immediately or at any time afterwards without notice to me/us and without my/our consent to sell or dispose of the Securities or any of them …

The court agrees with the submissions of learned counsel for the plaintiff that there was no restriction as to when the shares could be sold and no legal obligation on the plaintiff to sell the shares at any particular time or at any specific price or market value.

[104] The court finds cl 12.1 to be absolutely clear and unambiguous. In the event of a default, the plaintiff had the absolute prerogative to sell or otherwise dispose of the shares at any time as it deems fit. The court finds that there was no legal obligation on the part of the plaintiff to either inform or consult with the defendant before doing so. The court is of the view that the delay by the plaintiff in disposing off the shares as a result of the various letters written by the defendant asking for time to settle the amount due does not render the sale of the shares an illegality. The court thus finds the defendant's counterclaim/set off to be without merit.

CONCLUSION

[105] In conclusion the court finds, taking into account the totality of the evidence adduced in this case, that the plaintiff has made out a case against the defendant on a balance of probabilities. This is a case that must be determined on the facts. And the facts would show that the banking transactions are between the plaintiff and the defendant. Whatever amounts that are outstanding as a result of the private arrangement the defendant had with the late Tan Sri Wee Boon Ping cannot be visited upon the plaintiff. The court further finds that the defendant has failed to prove his counterclaim/set off against the plaintiff on a balance of probabilities.

[106] Accordingly, paras (a), (b) and (c) of the plaintiff's claim is allowed with costs. The defendant's counterclaim/set off is dismissed.

Plaintiff's claim allowed with costs and defendant's counterclaim dismissed.

Reported by Kohila Nesan